This petition for writ of certiorari by the Petitioners is filed within ninety (90) days of that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS IMPLICATED BY THIS PETITION.

United States Constitution, Article I, Section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

United States Constitution, Article I, Section 8:

> The Congress shall have the Power To lay and collect Taxes....

United States Constitution, Article II, Section 3:

> [The President]...shall take Care that the Laws be faithfully Executed....

United States Constitution, Article III, Section 1:

> The judicial power of the United States, shall be

vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XVI:

The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived....

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1340:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue....

28 U.S.C. Section 1346(a)(1):

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been

> erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

5 U.S.C. Section 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

> (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief

which is sought,

26 U.S.C. Section 7122:

Compromises.
(a) Authorization. The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.
....
(c) Standards for evaluation of offers.
(1) In general. The Secretary shall prescribe guidelines for officers and employees of the Internal Revenue Service to determine whether an offer-in-compromise is adequate and should be accepted to resolve a dispute.
....
(d) Administrative review. The Secretary shall establish procedures--
(1) for an independent administrative review of any rejection of a proposed offer-in-compromise or installment agreement made by a taxpayer under this section or section 6159 before such rejection is communicated to the taxpayer; and
(2) which allow a taxpayer to appeal any rejection of such offer or agreement to the Internal Revenue Service Office of Appeals.

26 U.S.C. Section 7422(a):

Civil actions for refund. (a) No suit prior to filing claim for refund. No suit or proceeding shall be

maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. Section 7433(a) and (d)(1):

Civil damages for certain unauthorized collection actions. (a) In general. If, in connection with any collection of Federal tax with
respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision
of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

....

(d) Limitations.(1) Requirement that administrative remedies be exhausted. A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

26 C.F.R. 301.7122-1(b):

(b) Grounds for compromise -- (1) Doubt as to liability. Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision or judgment....(2) Doubt as to collectibility. Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the liability.(3) Promote effective tax administration. (i) A compromise may be entered into to promote effective tax administration when the Secretary determines that, although collection in full could be achieved, collection of the full liability would cause the taxpayer economic hardship within the meaning of § 301.6343-1.(ii) If there are no grounds for compromise under paragraphs (b)(1), (2), or (3)(i) of this section, the IRS may compromise to promote effective tax administration where compelling public policy or equity considerations identified by the taxpayer provide a sufficient basis for compromising the liability. Compromise will be justified only where, due to exceptional circumstances, collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner. A taxpayer proposing compromise under this paragraph (b)(3)(ii) will be expected to demonstrate circumstances that justify compromise even though a similarly situated taxpayer may have paid his liability in full.

STATEMENT OF THE CASE.

From the early 1980's through 1986, American Agricorp ("AMCOR") was in the business of promoting agricultural-based limited partnerships, an enterprise which included investments in Texas farmland as well as crops to be grown in Texas or California. In the mid-1980's, AMCOR's business activities drew the attention of the Criminal Investigation Division of the IRS (the "CID").

Beginning in 1987 and continuing through 1988, the IRS through the CID conducted criminal investigations of certain farmers and AMCOR officers. At the same time, the IRS pursued civil examinations of the AMCOR limited partnerships. In May of 1988, the CID began criminal proceedings against these AMCOR officers and general partners for certain fraudulent transactions they had allegedly engineered.

During the course of its simultaneous criminal and civil investigations of AMCOR, the IRS improperly solicited one George Schreiber, the only general partner in each of AMCOR's limited partnerships and a target of the CID criminal investigation, to become a so-called "Tax Matters Partner" of each limited partnership; and he possessed the authority to grant civil extensions of the statute of limitations as to each partnership. The IRS knew that Schreiber, a general partner of AMCOR and a target of the CID's criminal investigation, had a conflict of interest representing AMCOR's limited partners and granting any extensions of the limitations period on their behalf.

In March of 1989 and continuing until April of 1993,

the IRS seized and held the books of AMCOR's limited partnerships upon a search warrant which did not authorize such a global seizure. This action caused disruption among the limited partners' recordkeeping and impeded their efforts to mount a defense to the IRS' partnership-level civil proceedings which were eventually initiated in 1990. In fact, the conduct of the IRS during its civil investigation of the partnerships generated claims by the limited partners in Tax Court that the IRS *inter alia* had used the civil investigation to obtain evidence in the CID's simultaneous criminal investigation against AMCOR's officers and general partners; had deprived the limited partners of vital partnership records which interfered with their response to this investigation; and had inordinately frustrated discovery which resulted in unwarranted delay of the proceedings.

The IRS' civil investigation lasted well into the 1990's and in the aftermath of the CID's criminal prosecution of AMCOR's officers and general partners, the IRS eventually determined that AMCOR was an abusive tax shelter, disallowing certain deductions taken by the AMCOR partnerships, deficiencies which passed through to the limited partners. On July 17, 2000, the Tax Court ultimately denied the limited partners' request for misconduct-based relief in the form of an abatement of interest due on their tax liability, holding that it had no jurisdiction to provide such relief. *Crop Associates-1986, Frederick H. Behrens, Tax Matters Partner v. Commissioner*, Tax Court Docket No. 12532-90.

There is no dispute on this record that *none* of the limited partners bears any responsibility for the unwarranted delay taken either by the CID in completing its criminal investigation of AMCOR's officers and

general partners or by the IRS in the simultaneous civil investigation of the limited partnerships which resulted in their tax liability.

While this civil investigation by the IRS of the limited partnerships was proceeding to its conclusion in the Tax Court in 2000, Congress enacted The Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 ("the Reform Act"). Before the Reform Act's passage in 1998, Treasury regulations promulgated by the Secretary of the Treasury authorized the Commissioner of the IRS to compromise tax liability as well as accumulating interest thereon for only *two* reasons, i.e., (a) doubt as to liability; or (b) doubt as to collectability. 26 C.F.R.301.7122-1.

The Reform Act expanded the Commissioner's ability to compromise tax liability and any accumulating interest; it directed the Commissioner of the IRS to amend 26 C.F.R. 301.7122-1 in order to implement *new* standards for accepting offers in compromise and prescribed guidelines for determining whether to accept such offers from taxpayers, especially with accrued interest and penalties as the result of long delay by the IRS in establishing tax liability. 26 U.S.C. Section 7122(c).

Specifically, Congress unmistakably expressed its will in House Conference Reporter 599, 105th Congress, 2d Session 289 (1998):

> [t]he conferees *expect* that the present regulations will be expanded to permit the IRS, in certain circumstances, to consider additional factors (i.e., factors other than doubt as to liability or collectability) in determining whether to

> compromise the income tax liabilities of individual taxpayers. For example, the conferees anticipate that the IRS will take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax regulation. *The conferees anticipate that among other situations, the IRS may utilize this new authority to resolve long-standing cases by foregoing penalties and interest which have accumulated as a result of delay in determining a taxpayer's liability....*

Id. (emphasis supplied). The United States Congress therefore unequivocally directed the Secretary of the Treasury to promulgate regulations authorizing the settlement of cases involving long delays in establishing tax liability and to accept compromises in such long-standing cases by foregoing the payment of penalties and interest "which have accumulated as a result of [such long] delay [by the IRS] in determining a taxpayer's liability." *Id.*

In the wake of the Reform Act, the Secretary of the Treasury promulgated 26 C.F.R. 301.7122-1T, a temporary regulation which contained *three* grounds for compromising tax liabilities: (a) doubt as to liability; (b) doubt as to collectability; and (c) "the promotion of effective tax administration." *None* of this new language in the temporary regulation reflected Congress' expressed will that the Commissioner of the IRS have authority to compromise penalties and interest accumulated as the result of the IRS' delay in establishing tax liability in "long-standing cases."

This failure by the Secretary of the Treasury to reflect the will of Congress in its temporary regulation caused Members of the House Ways and Means Committee, *the principal authors of the Reform Act*, to write then Treasury Secretary Lawrence Summers on October 15, 1999. Adverting to the Reform Act's legislative history, the authors of the Reform Act made the point that "we anticipated that the offer-in-compromise authority could be used to settle cases where the Service's consideration has taken many years to complete and assessment of an additional tax liability wasn't made until years after the year in which deductions were originally claimed (at which point interest on the liability often greatly exceeded the underlying liability)."

The Members' letter to Secretary Summers continued:

> Instead [of promulgating regulations which reflect this Congressional intent], the new temporary regulations *ignore* the legislative history accompanying sec. 3462 of the [Reform] Act and continue to construe narrowly the IRS' authority to compromise tax debts. The only new ground provided in the regulations for accepting an offer-in-compromise is to "promote effective tax administration." The temporary regulations state that this ground is met when...collection of the full liability will create economic hardship...; [when] collection of the full liability will be detrimental to voluntary compliance; or [when] compromise will not undermine voluntary compliance.
>
> *....[Yet] [n]owhere [in the temporary regulations] is there any mention of authority to*

> *compromise long-standing cases by foregoing penalties and interest which have accumulated as a result of delays in determining a taxpayer's liability. This omission is simply unacceptable....*
>
> We hereby request that these regulations be corrected to conform with the legislative history of section 3462 of the [Reform] Act [addressing compromises] and provide the full relief to taxpayers *that Congress intended.*

(Emphasis supplied).

Despite this clear directive from Congress, *indeed from the authors of the Reform Act itself*, to promulgate regulations which authorize the IRS to make offers in compromise for accumulated interest and penalties whenever long delays in establishing tax liability have occurred, the Treasury Secretary in July of 2002 instead adopted 26 C.F.R. 301.7122-1 as a final regulation. It retained subsection (c)'s "effective tax administration" portion of the temporary regulation without any mention of the IRS's authority to compromise long-standing cases by foregoing penalties and interest which have accumulated as a result of delays in determining a taxpayer's liability, ignoring entirely Congress' expressed intent in enacting 26 U.S.C. Section 7122.

The Secretary's commentary accompanying his adoption of the permanent version of 26 C.F.R. 301.7122-1 acknowledged Congress' intent in this regard but chose to disregard it:

> The IRS and the Treasury Department are mindful that [Congress] in adding section 7122(c) as part of RRA 1998, anticipated that the IRS may

> use the authority provided in section 7122(c) to resolve longstanding cases by foregoing penalties and interest resulting from delays in determining a taxpayer's liability. See H. Conf. Rep. 599, 105th Cong., 2d Sess. 289(1998). The IRS' experience in applying the temporary regulations is that these regulations have given effect to the intent of Congress, as expressed in the [*48028] Conference Report, *since cases involving substantial interest and penalties often can be compromised under the standards of doubt as to collectability and hardship.*

(Emphasis supplied).

By implementing guidelines to make offers-in-compromise on interest and penalties only to those taxpayers who can show doubt as to collectability and/or hardship under the permanent version of 26 C.F.R. 301.7122-1, the Secretary overrode Congress' intent to have the IRS make offers-in- compromise on interest and penalties to *all* taxpayers who are subject to long delays in establishing their tax liability, *regardless of doubt as to collectability or hardship.* In this way, the Secretary denied taxpayers the full relief which Congress intended when it passed the Reform Act.

Pursuant to this regulation, one at odds with Congressional intent, the IRS in the summer of 2002, after a delay of between 15 and 17 years in establishing their tax liability, notified the AMCOR limited partners for the first time of increased tax assessments and interest for the tax years 1984, 1985 and 1986. In almost all instances, the interest charges exceeded the principal taxes due by about 500%. For example, limited partner

Thomas D. Adams was assessed $22,085.00 in increased tax for the year 1986 and $91,035.47 in interest on this tax liability, for a total arrearage of $113,120.47 (App.18-19).

Immediately after these assessments and even before the AMCOR limited partners had sought rebates or refunds of interest, the IRS through Field Director Lynne Walsh in the Holtsville, New York Office sent them a form letter preemptively denying any abatement or refund of the interest assessed or collected on their tax liability for these years("the Selesky letter")(App. 20-21).

Some AMCOR limited partners paid the entire amount due, some paid the principal taxes due, and some paid nothing. In all instances, these assessments were made by the IRS after the limitations period had elapsed, apparently based upon extensions granted by the Tax Matters Partners of AMCOR who possessed no authority to impair the rights of the individual limited partners.

Alleging most of these facts, the AMCOR limited partners ("the taxpayers") brought this civil action in the United States District Court for the Southern District of Texas on January 23, 2003, against the Secretary of the Treasury ("the Secretary") and the Commissioner of the IRS ("the Commissioner") seeking a judgment declaring that 26 C.F.R. 301.7122-1 unconstitutionally contravenes separation of powers principles because it fails to implement Congress' intent in enacting the Reform Act; ordering the Commissioner to make offers-in-compromise, as Congress intended, to those taxpayers who have not yet paid the accumulated interest on their tax liabilities; and imposing interest no greater than the standard rate of interest under 26 U.S.C. Section 6221(App. 4-5). Those

taxpayers who had already paid interest on their tax liability for 1984, 1985 and 1986, sought a refund of interest payments consistent with the Secretary's duty to make offers in compromise on such interest *ab initio*(App.5).

By amendment, the taxpayers sought damages under the Taxpayers Bill of Rights, 26 U.S.C. Section 7433, for the IRS' intentional, reckless or negligent disregard of a statute or regulation when it sent the taxpayers the Selesky letter, preemptively denying them an abatement or refund of their interest payments without notice, without a hearing and in contravention of congressional mandate that offers-in-compromise be made in these circumstances(App.6).

The United States, as the real party in interest, moved to dismiss the taxpayers' amended complaint for lack of subject matter jurisdiction based upon sovereign immunity, the Anti-Injunction Act, the Declaratory Judgment Act and the taxpayers' failure to exhaust administrative remedies (App.6). In a decision filed on February 13, 2005, the District Court, Werlein, J., granted the government's motion and dismissed the taxpayers' amended complaint(App.3-17).

The District Judge determined that the taxpayers lacked standing under Article III or the Administrative Procedure Act to challenge on separation of power principles the Secretary's failure to promulgate regulations which expressly empower the IRS to make offers-of-compromise for interest/penalties resulting from long delays by the IRS in establishing tax liability(App.9-10). Specifically, the motion judge thought that the "effective tax administration" language of the regulation

which the Secretary did promulgate gave the taxpayers the right to seek offers-in- compromise from the IRS for interest and they did not do so(App.10). The United States' limited waiver of sovereign immunity had therefore not been invoked(App.9-11).

The District Judge also ruled that the Anti-Injunction Act and the Declaratory Judgment Act barred this suit brought by those taxpayers who have not already paid the assessed interest to the IRS since this action interferes with the assessment or collection of taxes, regardless of the fact that only interest is at issue(App.11-12). For those taxpayers who have paid the IRS the interest/penalties assessed and who now seek a refund, the lower court ruled that they were still bound first to file an administrative claim with the IRS for the refund, in the absence of which there was no subject matter jurisdiction in the District Court because of sovereign immunity(App.12-13).

Finally, the District Court determined that the Selesky letter denying the taxpayers any abatement or refund of interest, sent *before* the taxpayers had requested such relief, even if reckless or negligent conduct by the IRS, did not establish an inadequacy of administrative remedies for the taxpayers(App.13-14). They must first exhaust their administrative remedies with the IRS concerning its use of this anticipatory form letter before resorting to the federal district court for damages upon the basis that the IRS violated due process or the Taxpayers' Bill of Rights(App.14-15). Accordingly, there was no subject matter jurisdiction to hear this controversy(App.15).

On March 21, 2005, the Court of Appeals for the

Fifth Circuit affirmed the dismissal in an unpublished *per curiam* opinion, essentially for the reasons stated in the District Court's decision (App. 1-2).

The taxpayers have now brought to this Court their petition seeking a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT.

I. The Decision Below Conflicts With Decisions Of This Court Establishing Subject Matter Jurisdiction In the Federal Courts To Decide Whether The Treasury Secretary Violated The Constitution When He Refused To Implement The Tax Reform Act As Congress Had Intended, Even After Being Specifically Instructed By Congress To Do So.

In Article I, Section 1 of the Constitution, the Framers explicitly and unambiguously vested all lawmaking powers in the Senate and House of Representatives. *INS v. Chadha*, 462 U.S. 919, 945-946(1983). In Article II, Section 3, the President as the Chief Executive Officer is obligated to "take Care that the Laws be faithfully Executed...." His role in the lawmaking process is limited to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587(1952). Under Article III, Section 1, this Court together with the inferior federal courts are vested with the judicial power of the United States "to say what the law is," including the Constitution itself, and whether any

law conforms with that fundamental document. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177(1803)(Marshall, C.J.).

While not hermetically sealed off from one another, these three branches of government are separate and distinct enough to provide checks and balances as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another. *Buckley v. Valeo*, 424 U.S. 1, 121(1976). The Framers wisely perceived based upon their experience under British rule that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *INS v. Chadha*, 462 U.S. at 960-961 (Powell, J., concurring) quoting The Federalist No. 47, p. 324(J. Madison). See *Myers v. United States*, 272 U.S. 52, 293(1926)(Brandeis, J., dissenting).

Though mindful that these co-ordinate branches of government need to be interdependent to some degree in order to form a workable governance, this Court has not hesitated to enforce the separation of powers doctrine where one branch has impaired or sought to assume a power central to another branch. See, e.g., *Buckley v. Valeo*, 424 U.S. at 123(legislative act impinges on Executive powers under Article II); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587-589 (President may not execute and exercise legislative authority belonging only to Congress);*United States v. Ferreira*, 54 U.S. (13 How.) 40, 50-51(1852)(executive or administrative duties may not be imposed upon Article III judges).

A violation of separation of powers occurs in one of two forms: one branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 433;443(1977)(Congress' legislative function does not interfere with Executive function by enactment which assumed control of non-private Presidential materials after resignation); *United States v. Nixon*, 418 U.S. 683, 706-707 (1974) (Executive claim of unqualified privilege unrelated to Executive function rejected as interfering with judicial process of subpoena duces tecum on separation of powers principles). Alternatively, the doctrine will be violated when one branch assumes a function that more properly is entrusted to another branch. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer, supra* (Executive Order to seize steel mills usurps a legislative function and is impermissible on separation of powers principles); *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928)(legislature cannot endow a legislative office with Executive responsibilities consistent with separation of powers principles).

In this controversy, the taxpayers allege that Congress enacted the Reform Act in 1998 to make the Tax Code more "taxpayer-friendly," clearly indicating in its legislative history that, among other things, the IRS was authorized to make offers-in-compromise on interest and penalties whenever there has been a long delay in determining tax liability. To this end, 26 U.S.C. Section 7122(c)(1), provides that the Treasury Secretary "*shall* prescribe guidelines for officers and employees of the Internal Revenue Service to determine whether an offer-in-compromise is adequate and should be accepted to resolve a dispute."(emphasis supplied)

In response, the Secretary of the Treasury promulgated 26 C.F.R. 301.7122-1T, a temporary regulation which contained *three* grounds for compromising tax liabilities: (a) doubt as to liability; (b) doubt as to collectability; and (c) "the promotion of effective tax administration." *None* of this new language in the temporary regulation reflected Congress' expressed will that the IRS have authority to compromise penalties and interest accumulated as the result of the its delay in establishing tax liability in "long-standing cases."

The authors of the Reform Act then wrote the Secretary that this omission was "unacceptable." They asked that these regulations be corrected to conform with the legislative history of section 7122 (c)(1) in order to provide taxpayers the full relief *"that Congress intended"*(emphasis supplied). Instead, the Secretary adopted 26 C.F.R. 301.7122-1 which retained subsection (c)'s "effective tax administration" portion of the temporary regulation but left out any reference to the IRS's authority to compromise penalties and interest in long-standing cases, ignoring entirely Congress' expressed intent in enacting Section 7122(c)(1). As the Secretary put it, "cases involving substantial interest and penalties often can be compromised under the standards of doubt as to collectability and hardship."

By employing guidelines to make offers-in-compromise on interest and penalties available only to those taxpayers who can show doubt as to collectability and/or hardship under the permanent version of 26 C.F.R. 301.7122-1, the Secretary overrode Congress' intent to have the IRS make offers-in-compromise on interest and penalties available to *all* taxpayers who are subject to long delays in establishing their tax liability, *regardless of*

doubt as to collectability or hardship.

For the taxpayers, the effects of the Secretary's refusal to adhere to Congress' will were immediate. After a delay of between 15 and 17 years in establishing their tax liability, the IRS notified them in 2002 for the first time of increased tax assessments and interest for the tax years 1984, 1985 and 1986. In almost all instances, the interest charges exceeded the principal taxes due by 500%. The taxpayers have therefore made a viable claim on this record that the Treasury Secretary violated the Constitution's separation of powers principles when he refused to implement the Reform Act as Congress had intended, even after Congress specifically instructed him to do so.

As part of the Executive branch of government, the Secretary was bound to implement the law, *not* rewrite it. His decision to ignore Congress' intent and to write regulations which undercut the very purposes of the Reform Act in order to maximize levies upon citizens despite long delays by the IRS in determining their tax liability, has impermissibly interfered with Congress' performance of its constitutionally assigned functions.

After all, not only is Congress constitutionally obligated under Section 1 of Article I to enact laws such as the Reform Act; it also has the preeminent and fundamental duty under Section 8 of Article I, reinforced by the sixteenth amendment to the Constitution, to "lay and collect Taxes." In furtherance of these fundamental constitutional duties, Congress provided the authority in the legislative history of the Reform Act for accepting offers-in-compromise with taxes, interest and penalties in "long-standing cases;" and it directed the Secretary to

provide guidelines for IRS employees to accomplish that result consonant with its "taxpayer-friendly" legislation. In doing so, it must be presumed that Congress was acting within its assigned sphere of enacting laws and collecting taxes. *INS v. Chadha*, 462 U.S. at 951-952.

The Secretary's role in the collection of taxes at its core is an administrative and ministerial one in furtherance of Congress' preeminent role in laying and collecting taxes. This Court has referred to such an agency's activity as being "quasi-legislative" in character. *Humphrey's Executor v. United States*, 295 U.S. 602, 628(1935). "Clearly, however, '[i]n the framework of our Constitution, the [Executive's] power to see that the laws are faithfully executed refutes the idea that [the Secretary] is to be a lawmaker.'" *INS v. Chadha*, 462 U.S. at 953, n.16 quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587.

This flows from the principle enunciated by this Court that it is *not* within the Executive's power under Article II of the Constitution to construe Congress' legislation in a way that is most convenient for him; and it is *not* within his power to refrain from executing laws duly enacted by Congress in a manner at odds with its expressed intent, in effect nullifying Acts of Congress. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 319(1930). *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 609;612-613 (1838). See *Roberts v. United States*, 176 U.S. 221, 231 (1900). See also *Clackamas County, Or. v. McKay*, 219 F.2d 479, 495(D.C.Cir.)(Prettyman, J.), *vacated as moot*, 349 U.S. 909(1955)("Executive officers cannot...create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They

cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts.").

Yet this is precisely what the Secretary has done. In the face of Congress' unambiguous intent, twice expressed to the Secretary, that he promulgate regulations which encourage IRS employees to make offers-in-compromise with interest and penalties whenever long delays in determining taxpayer liabilities have taken place, the Secretary refused to do so. In the absence of such regulations, he then assessed and collected from the taxpayers the full amount of interest in 2002 for tax liability dating back to 1984, refusing to consider abatement or refund of interest with anticipatory form letters sent to the taxpayers even before they could even make such requests.

It was *not* within the Secretary's power to ignore Congress' intent that the IRS make offers-in-compromise for interest and penalties as the result of long delay in determining tax liability. He was duty bound to promulgate regulations to that effect and then implement them consonant with Congress' will. His refusal to do so justifiably invokes this Court's and the lower federal courts' fundamental subject matter jurisdiction under Article III and 28 U.S.C. Section 1331, to decide whether he has violated the Constitution's separation of powers principles by nullifying law which Congress has enacted. *INS v. Chadha*, 462 U.S. 953-954 n.16. *Yakus v. United States*, 321 U.S. 414, 425(1944)("[T]he only concern of courts is to ascertain whether the will of Congress has been obeyed."). *United States v. Lee*, 106 U.S. 196, 220-223(1882). *Kendall v. United States*, 37 U.S. (12 Pet.) at 622-623. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177-178.

"An unlimited power to tax involves, necessarily, a power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327(1819)(Marshall, C.J.). By assigning to himself the power to assess and collect interest from the taxpayers five times their tax liability after the IRS delayed 17 years to determine that tax liability—in clear defiance of Congress' intent that he not do so—the Secretary has engaged in the kind of unchecked Executive power against which the Framers wisely guarded. The lower courts' failure to assume subject matter jurisdiction over the taxpayers' suit based upon the Secretary's violation of separation of powers principles contravenes this Court's decisions and warrants the granting of the taxpayers' petition. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404(1821). See *United States v. Klein*, 80 U.S. (13 Wall) 128, 143-147(1872).

II. The Decision Below Conflicts With This Court's Decisions Holding That Exhaustion Is Not Required When Administrative Action Will Leave The Taxpayers' Constitutional Claims "Still Standing" And Where Administrative Remedies Would Be Futile In The Face Of The IRS' Preemptive Denial Of An Abatement Or Refund Of Interest.

Because the taxpayers did not allege that they had exhausted their administrative remedies with the IRS concerning either their claims for abatement/refund of interest in these long-standing cases or their claims regarding the Selesky letter, the District Court concluded that the government's limited waiver of sovereign immunity had not been invoked and that subject matter jurisdiction was lacking to consider their claims(App.10-15).

This ruling ignores the allegations of the taxpayers' complaint that the Treasury Secretary violated the Constitution's separation of powers principles when he refused to implement the Reform Act as Congress intended, even after Congress specifically instructed him to do so; and that 26 C.F.R. 301.7122-1 is unconstitutional as written and should be stricken because it fails to authorize IRS personnel to make offers-in-compromise for interest and penalties whenever the IRS has engaged in long delays in determining tax liability.

The ruling also ignores the taxpayers' allegations that in the particular circumstances of this case, i.e., where the Secretary of the Treasury has *already* refused to promulgate regulations reflecting Congress' intent that the IRS accept offers-in-compromise for interest accumulated because of its long delay in determining tax liability, where it has *already* assessed or collected interest from these taxpayers in full in violation of Congress' directive to accept offers in compromise for a lesser amount and where in a "form" letter, before claims were even made, it has *already* denied the taxpayers any conceivable relief to which they would be entitled in an administrative proceeding, any exhaustion of administrative remedies would be futile.

These well founded allegations by the taxpayers come within this Court's decisions holding that exhaustion of administrative remedies is not required when administrative action will leave the taxpayers' constitutional claims "still standing" and where the administrative remedies would be futile. In the first place, *none* of this Court's decisions "stand for the proposition that the exhaustion doctrine must be applied blindly in

every case" to deny a claimant a judicial forum whenever administrative remedies purport to be available. *McKart v. United States*, 395 U.S. 185, 200-201 (1969). Administrative remedies that are inadequate need not be exhausted. *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587(1989). *Greene v. United States*, 376 U.S. 149, 163(1964).

The taxpayers' claim that the Secretary's implementation of Congress' intent expressed in 26 U.S.C. Section 7122, violates separation of powers principles "is a constitutional one that the [IRS] can hardly be expected to entertain." *Public Utilities Commission v. United States*, 355 U.S. 534, 539-540(1958). The question of whether the Secretary hewed to constitutional principles in promulgating 26 C.F.R. 301.7122-1 is beyond the jurisdiction of the IRS to resolve; nothing furthering its administrative needs is accomplished by demanding that the taxpayers first present their constitutional claim to its administrative decisionmaking. *Weinberger v. Salfi*, 422 U.S. 749, 765-766 (1975). The constitutional claim would be still standing in the wake of any such proceeding and "the administrative agency may be defied and judicial relief sought as the *only* effective way of protecting the asserted constitutional right." *Public Utilities Commission v. United States*, 355 U.S. at 540 (emphasis supplied). See *Staub v. City of Baxley*, 355 U.S. 313, 319(1958).

Second, the taxpayers' resort to the IRS' administrative remedies in order to obtain an abatement or a refund of interest would have been "utterly futile," *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 505(1928), because it was clear that their claims would be rejected. Where the Secretary, in defiance of Congress,

has already refused to implement regulations authorizing offers-in-compromise for accumulated interest as the result of the IRS' long delay in determining tax liability, where he has already assessed and collected full interest despite Congress' intent that he not do so, and where he has already denied the taxpayers relief in writing even before they made claims for an abatement or refund, the IRS' position on the issues is already set and *the taxpayers have no hope.* "[T]he administrative procedure is at an end and the [taxpayers] can thereafter resort to a federal court to restrain further action...in violation of constitutional rights." *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24, 34(1934).

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate the judgment below and declare that 26 C.F.R. 301.7122-1, as presently implemented by the Respondents, violates separation of powers principles; to remand the cause to the District Court for the Southern District of Texas, Houston Division, for further proceedings and a trial on the merits of the taxpayers' claims for an abatement or refund of the interest and penalties assessed and collected by the Respondents; for an assessment of damages under the Taxpayers' Bill of Rights, 26 U.S.C. Section 7433; or to provide the taxpayers such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 04-20346
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE DALTON BROOKS; ET AL,
Plaintiffs,

GEORGE DALTON BROOKS; CORWIN HENRY MEYER; RICHARD WELSH; MONROE ASHWORTH, III; MARTIN AMON; ET AL,
Plaintiffs-Appellants,

Versus

KENNETH DAM, Etc; ET AL,
Defendants,

UNITED STATES OF AMERICA; JOHN SNOW, Secretary, Department of Treasury; MARK W. EVERSON, Commissioner of the Internal Revenue Service,
Defendants-Appellees.

March 21, 2005, Filed

COUNSEL: GEORGE DALTON BROOKS; CORWIN HENRY MEYER; RICHARD WELSH; MONROE ASHWORTH, III; MARTIN AMON; ET AL, Plaintiffs - Appellants: Henry L Klein, James Harold Daigle, Jr, Klein Daigle, New Orleans, LA.

For UNITED STATES OF AMERICA, Defendant - Appellee: Bruce Raleigh Ellisen, US Department of Justice, Tax Division, Washington, DC.

JUDGES: Before JONES, WIENER, and CLEMENT, Circuit Judges.

OPINION: PER CURIAM: *

As the district court correctly dismissed the action of Plaintiffs-Appellants on the determination that the United States is the real party of interest and its sovereign immunity has not been waived by the Administrative Procedure Act, we need not address the alternative grounds for dismissal, including without limitation, lack of standing, procedural bar by the Anti-Injunction Act and the Declaratory Judgment Act, and failure to exhaust administrative remedies. For the reasons more particularly set forth in its Order, the district court's rulings are, in all respects,

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION NO. H-03-0259

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

GEORGE DALTON BROOKS, CORWIN HENRY MEYER, RICHARD WELSH AND MONROE ASHWORTH III, et al., Plaintiffs,

vs.

JOHN SNOW, SECRETARY OF THE TREASURY, and MARK W. EVERSON, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, Defendants. [1]

February 12, 2004, Decided
February 13, 2004, Entered

COUNSEL: For GEORGE DALTON BROOKS, CORWIN HENRY MEYER, RICHARD WELSH, MONROE ASHWORTH, III, plaintiffs: Ronald Joseph Kormanik, Sydow Kormanik et al, Houston, TX. Henry L Klein, Attorney at Law, New Orleans, LA.

JUDGE: EWING WERLEIN, JR., UNITED STATES DISTRICT JUDGE.

OPINIONBY: EWING WERLEIN, JR.

OPINION:

MEMORANDUM AND ORDER

Pending are the United States's Motion to Dismiss First Amended Complaint (Document No. 10) and Defendants George Dalton Brooks, et al.'s Motion for Partial Summary Judgment (Document No. 20) and Motion for Stay of Collections and for Expedited Consideration (Document No. 47). After carefully considering the motions, responses, replies, and the applicable law, the Court concludes that the United States's motion should be granted and the case dismissed for lack of jurisdiction.

I. Background

This action arises out of a dispute over interest that accrued on taxes during an alleged delay by the Internal Revenue Service ("IRS") in assessing the taxes owed.

In the mid-1980s, Plaintiffs invested in various AMCOR partnerships as limited partners. During the late-1980s, the IRS launched criminal investigations of various AMCOR officers and civil examinations of the AMCOR Partnerships. The investigations lasted into the 1990s. Finding AMCOR to be an abusive tax shelter, the IRS disallowed certain deductions taken by the AMCOR partnerships, which created deficiencies that passed through to the partners.[2] Following the conclusion of Tax Court proceedings at the partnership level, Plaintiffs received notices of assessments in 2002 for increased tax and interest relating to tax years 1984, 1985, and 1986. According to Plaintiffs, the accrued interest amounted to more than five times the tax due.

In April, 2003, Plaintiffs filed this lawsuit against Defendants Kenneth Dam, then Deputy Secretary of the Treasury, and Robert Wenzel, then Acting

Commissioner of the Internal Revenue Service. (The names of the current Secretary of the Treasury and Commissioner of Internal Revenue Service have been substituted in this Memorandum and Order.) Plaintiffs seek from the Court a declaration that Treasury Regulation *26 C.F.R. 301.7122-1* "is inconsistent with Congressional intent" by its failure to include authority to compromise penalties and interest that accumulate as a result of the Government's delay in determining a taxpayer's tax liability, and further seek a court order requiring Defendants to "(a) apply rules consistent with Congressional mandate to offers in compromise submitted by AMCOR partners; (b) abate not less than the interest accrued from the commencement of the criminal investigation until the promulgation of the final regulations; and (c) impose interest at a rate not greater than the standard rate of interest under *Internal Revenue Code § 6221*." Document No. 9, P221; Document No. 35, P492. Those of Plaintiffs who have paid the taxes, penalties, and interest, seek a refund of the interest that they paid "in excess of the amount appropriately determined if the final regulation had included the standards mandated by Congress," or alternatively, a refund of all interest paid that accrued during periods of delay caused by errors of the IRS. Document No. 9, P222; Document No. 35, P493. In effect, Plaintiffs are asking the Court to mandate the Secretary of the Treasury to write a regulation that Plaintiffs believe the Secretary should have written in order to comply with what Plaintiffs deem to have been "Congressional intent," and to relieve Plaintiffs from all liabilities for interest on their past due taxes that has accrued as a result of such regulation not having been written by the Secretary.

Without moving for leave, Plaintiffs filed a Second Amended Complaint n3 reiterating the foregoing claims and (1) adding the names of another 376 taxpayers as Plaintiffs, (2) substituting John Snow as Secretary of the Treasury and Mark W. Everson as Commissioner of the IRS, and (3) adding a claim for damages under *26 U.S.C. § 7433*, which allows a civil action for damages caused by the intentional, reckless, or negligent disregard of a statute or regulation by an IRS employee in connection with the collection of a federal tax. *See* Document No. 35, P494.

The United States, as the real party in interest, moves for dismissal for lack of subject matter jurisdiction based on sovereign immunity, the *Anti-Injunction Act*, *the Declaratory Judgment Act*, and Plaintiffs' failures to exhaust administrative remedies.

II. Standard of Review

Under *Rule 12(b)(1)*, a party can seek dismissal of an action for lack of subject matter jurisdiction. *FED R. CIV P. 12(b)(1)*. The burden of establishing subject matter jurisdiction is on the party seeking to invoke it. *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)*. In evaluating a motion to dismiss pursuant to *Rule 12(b)(1)*, a court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* (citing *Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996)*). The question of subject matter jurisdiction is for the court to decide even if the question hinges on legal or factual determinations. *See* id. (citing *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)* (holding the

existence of disputed material facts does not preclude a court from evaluating the merits of a jurisdictional challenge)). *Rule 12(b)(1)* challenges to subject matter jurisdiction come in two forms: "facial" attacks and "factual" attacks. *See Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir. 1990)*; *Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981)*. A facial attack, which consists of a *Rule 12(b)(1)* motion unaccompanied by supporting evidence, challenges the court's jurisdiction based solely on the pleadings. *See Lawrence, 919 F.2d 1528-29*; *Paterson, 644 F.2d at 523*. When presented with a facial challenge to subject matter jurisdiction, the court examines whether the allegations in the complaint are sufficient to invoke the court's subject matter jurisdiction, assuming the allegations to be true. *Lawrence, 919 F.2d at 1529*; *Paterson, 644 F.2d at 523*.

When accompanied by supporting evidence, a *Rule 12(b)(1)* motion challenging the court's jurisdiction is a factual attack. *Paterson, 644 F.2d at 523*. A plaintiff responding to a factual attack on the court's jurisdiction generally bears the burden of proving by a preponderance of the evidence that the court has subject matter jurisdiction. *Id.* If, however, the facts necessary to sustain jurisdiction implicate the merits of the plaintiff's cause of action, then the court must proceed as it would under *Fed. R. Civ. P. 12(b)(6)* or, in a proper case, *Rule 56*. *See Xerox Corp. v. Genmoora Corp., 888 F.2d 345, 350-51 (5th Cir. 1989)*; *see also Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229, 2232* & n.2 (1984) (accepting allegations as true on appeal because district court's reasoning made clear that it had dismissed complaint on ground that allegations did not state Title VII claim, even though district court invoked *Rule 12(b)(1)* rather

than *Rule 12(b)(6)*). The United States's *Rule 12(b)(1)* motion is not accompanied by supporting evidence, and the attack is therefore facial.

III. Discussion

The Secretary of the Treasury ("Secretary") is authorized by statute to compromise any civil or criminal case arising under the Internal Revenue Laws prior to its reference to the Department of Justice for prosecution or defense. *See 26 U.S.C. § 7122(a).* The statute conferring this authority requires the Secretary to prescribe guidelines for officers and employees of the Internal Revenue Service to determine whether an offer-in-compromise is adequate and should be accepted to resolve a dispute. Id. at *§ 7122(c)(1).* Pursuant to this statute, the Secretary promulgated *26 C.F.R. § 301.7122-1*, entitled "Compromises," which lists three grounds for compromise by the Secretary: "Doubt as to liability," "Doubt as to collectibility," and "Promote effective tax administration." *26 C.F.R. § 301.7122-1(b).* According to Plaintiffs, in promulgating *§ 301.7122-1*, the Treasury Regulation at issue, the Secretary violated the Constitution's separation of powers--by failing to list as a possible ground for compromise delays caused by the IRS in the determination of taxpayer liability. In so doing, Plaintiffs argue, the Secretary "implemented *[§ 301.7122-1]* in a manner inconsistent with the language and legislative history of a statutory provision it was designed to implement." Document No. 35, P485.

Plaintiffs' claims, identified as an alleged violation of the Constitution's separation of powers, concern actions taken by officers of the United States in an official capacity. Moreover, Plaintiffs seek not only declaratory

and injunctive relief, but an abatement or refund of interest. This is the very kind of case that directly implicates the United States itself, which is why it is the real party in interest as Defendant. *Bank One, Texas, N.A. v. Taylor, 970 F.2d 16, 33 (5th Cir. 1992)* is directly in point:

> [Although] the United States was not named as a party in the original action, "'if the judgment sought would expend itself upon the public treasury or domain, or interfere with public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,'" the suit will be construed as one against the United States requiring a waiver of sovereign immunity.

(quoting *Dugan v. Rank, 372 U.S. 609, 10 L. Ed. 2d 15, 83 S. Ct. 999, 1006 (1963)*). Plaintiffs must therefore identify a waiver of sovereign immunity that allows Plaintiffs to pursue these claims against the United States.

Plaintiffs contend that the *Administrative Procedure Act ("APA")* permits the Court to adjudicate their separation of powers claim. The APA permits one who is adversely affected or aggrieved by agency action to obtain judicial review of that action so long as the action is final agency action for which there is no other adequate remedy. *See Heckler v. Chaney, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649, 1654 (1985)*. Hence, in a case properly brought under the APA, there is a limited waiver of sovereign immunity. *See Stockman v.*

FEC, 138 F.3d 144, 152 n.13 (5th Cir. 1998) (noting waiver of sovereign immunity).

Plaintiffs' claim, however, is not brought by parties who have been adversely affected by final agency action. Indeed, they never applied under the regulation to obtain the ultimate relief they seek, namely, relief from liability for huge sums of interest accrued over the years on tax liability that Plaintiffs allege were not timely assessed due to delays by the IRS. Specifically, Plaintiffs never made offers-in-compromise under the "Promote effective tax administration" ground set out in Regulation *§ 301.7122-1(b)(3)*. The language implementing *§ 301.7122-1* states that "cases in which a taxpayer believes [] liability was caused in whole or in part, by *delay on the part of the IRS* or by the actions of third parties *may be appropriate for compromise under the public policy and equity standard.*" *67 Fed. Reg. 48025, 48027 (July 23, 2002)* (emphasis added). The "public policy and equity standard" falls within the "Promote effective tax administration" grounds for compromise. *See 26 C.F.R. § 301.7122-1(b)(3)(ii)*. Plaintiffs, however, do not allege they ever submitted any offers-in-compromise and, therefore, they have not shown themselves to be aggrieved by any final agency action either in the implementation of the regulation or in having any offers-in-compromise denied.

Instead, Plaintiffs complain that the Secretary did not cover the subject matter of Regulation *§ 301.7122-1(b)(3)* in language that they believe would have more accurately fulfilled "Congressional intent," i.e., specifically referring to liabilities incurred by delay of the IRS, much as was set forth in the Secretary's explanation for Regulation *301.7122-1(b)(3)(ii)*, quoted above from the Federal Register. Plaintiffs' claim of

injury, based on the Secretary not having written the regulation in the way that they believe it should have been written, is therefore so highly speculative and uncertain as even to lack Article III standing. "Federal courts consistently deny standing when claimed anticipated injury has not been shown to be more than uncertain potentiality." *Prestage Farms, Inc. v. Bd. of Supervisors, 205 F.3d 265, 268 (5th Cir. 2000).* Thus, Plaintiffs have no standing not only under the APA but also they have no standing under Article III to challenge as an unconstitutional violation of separation of powers the Secretary's formulation of Regulation *§ 301.7122-1.* Under these circumstances, Plaintiffs have shown no waiver of sovereign immunity by the United States to permit the prosecution of this case.

Even presuming Article III and APA standing, and therefore a waiver of sovereign immunity under the APA, the *Anti-Injunction* and *Declaratory Judgment Acts* still would preclude Plaintiffs' requested relief regarding *§ 301.7122-1.* The *Anti-Injunction Act* bars a suit "for the purpose of restraining the assessment or collection of any tax. . . ." *26 U.S.C. § 7421. The Declaratory Judgment Act* specifically excludes from its scope actions "with respect to Federal taxes." *28 U.S.C. § 2201(a).* "There is no dispute . . . that the federal tax exception to the *Declaratory Judgment Act* is at least as broad as the *Anti-Injunction Act.*" *Bob Jones University v. Simon, 416 U.S. 725, 40 L. Ed. 2d 496, 94 S. Ct. 2038, 2044 (1974).* Plaintiffs argue that these statutory bars do not apply because Plaintiffs' claims concern *interest* rather than *taxes.* Title *26 U.S.C. § 6601(e),* however, states that "any reference in this title . . . to any tax imposed by this title shall be deemed also to refer to interest imposed by this section

on such tax." *See Beall v. United States, 336 F.3d 419, 422 n.3 (5th Cir. 2003)* (noting that references in the Internal Revenue Code to taxes imposed by the Code are deemed also to refer to interest). Furthermore, the prohibition of the *Anti-Injunction Act* is broad, "applicable not only to the assessment or collection itself, but [] equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *Smith v. Rich, 667 F.2d 1228, 1230 (5th Cir. 1982)*. All of Plaintiffs who have not paid the accrued interest clearly intend by this action to interfere with IRS activities culminating in collection of the interest said to be owed by Plaintiffs. n4 Such action is proscribed by the *Anti-Injunction Act* which protects "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones, 94 S. Ct. at 2046* (quoting *Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 8 L. Ed. 2d 292, 82 S. Ct. 1125, 1129 (1962)*).

Those of the Plaintiffs who have paid the assessed interest, taxes, and penalties purport to assert actions under *28 U.S.C. § 1346* and *26 U.S.C. § 7422*. *See* Document No. 35, P442. n5 Title *28 U.S.C. § 1346* "'operates in conjunction with *26 U.S.C. § 7422* to provide a waiver of sovereign immunity in tax refund suits . . . when the taxpayer has fully paid the tax and filed an administrative claim for a refund.'" *Beall, 336 F.3d at 422* (quoting *Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir. 1994)*). The waiver extends to claims for wrongfully collected, unabated interest. *See Beall, 336 F.3d at 424*. The suit, however, "must be

preceded" by a claim for a refund "filed in accordance with regulations issued by the Secretary of the Treasury." *Your Ins. Needs Agency, Inc. v. United States, 274 F.3d 1001, 1003 (5th Cir. 2001)* (citing *United States v. Williams, 514 U.S. 527, 131 L. Ed. 2d 608, 115 S. Ct. 1611, 1616 (1995)* (noting that because the administrative claim is a condition to the waiver of sovereign immunity, "a party may not bring a refund action without first exhausting administrative remedies.")

The Plaintiffs who claim to have paid the taxes and interest assessed do not allege that they timely filed administrative claims for refunds as required by *§ 7422(a)*. Because an administrative claim for a refund is a "jurisdictional prerequisite" to a refund suit, and none was made, the Court lacks subject matter jurisdiction over these claims. *See Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir.)*; *Young v. United States, 332 F.3d 893, 894-95 (6th Cir. 2003)* ("This waiver of sovereign immunity . . . is limited by the requirement that a taxpayer pursue administrative remedies before bringing suit against the government.").

Finally, Plaintiffs claim that the sending of certain letters by the IRS, which Plaintiffs call "Selesky letters" because an IRS employee by the name of Selesky is mentioned in the letters, constitutes reckless or intentional violations of various Internal Revenue Code provisions for which Plaintiffs are entitled to recover damages under the "Taxpayer *Bill of Rights*," *26 U.S.C. § 7433*. This statute provides a limited waiver of sovereign immunity for suit against the United States for injuries caused by IRS employees' intentional or reckless disregard of tax laws in connection with the collection of taxes. *See 26 U.S.C. §*

7433(a); *Shaw v. United States, 20 F.3d 182, 184 (5th Cir. 1994)*. Recovery of damages under § *7433*, however, requires Plaintiffs first to exhaust their administrative remedies. *See 26 U.S.C. § 7433(d)(1)*; *26 C.F.R. § 7433-1(a)*; *Shaw v. United States, 20 F.3d 182, 183 (5th Cir. 1994)*. The Court's discretion to disregard a failure to exhaust statutorily mandated administrative remedies is severely limited. *See Information Resources, Inc. v. United States, 950 F.2d 1122, 1126 (5th Cir. 1992)* (emphasizing the limit on discretion regarding exhaustion of statutorily mandated administrative remedies); *Taylor v. United States Treasury Dep't, 127 F.3d 470 (5th Cir. 1997)* (comparing jurisdictional, statutorily required exhaustion with judicially created exhaustion requirements). Only when the administrative remedies are *inadequate* may a court disregard the failure to exhaust such remedies. *See Information Resources, 950 F.2d at 1126*. Such is not the case here, where fully adequate administrative remedies are provided in Regulation 301.7433-1.

Plaintiffs argue, however, that submitting a claim for abatement or refund of interest would be useless given the "preemptive" denial of claims in the "Selesky letters." The one "Selesky letter" exhibited by Plaintiffs, dated May 2, 2003, and addressed to Thomas B. Adams, denies certain claims but obviously does not deny any claim arising from the sending of the "Selesky letter" itself if, as Plaintiffs allege, that event is an intentional or reckless act by an IRS employee intended wrongfully to injure Plaintiff(s). If the sending of the "Selesky letter" itself were such an act of misconduct resulting in injury to Plaintiffs, then that is quite a separate claim as to which they must exhaust their

administrative remedies as a prerequisite to a § 7433 recovery of damages. Plaintiffs have not pled or shown any administrative exhaustion of their claim for damages under § 7433 based on Plaintiffs' alleged injuries from issuance of the "Selesky letters," and the Court therefore lacks subject matter jurisdiction over these claims.

IV. Order

Based on the foregoing, and because the Court lacks subject matter jurisdiction as to all of Plaintiffs' claims, it is

ORDERED that the United States's Motion to Dismiss (Document No. 10) is GRANTED, and all of Plaintiffs' claims are DISMISSED for lack of subject matter jurisdiction. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Document No. 20), Motion for Stay of Collections (Document No. 47-1), and Motion for Expedited Consideration (Document No. 47-2) are DENIED as MOOT.

The Clerk will enter this Order and send a copy to all parties of record.

SIGNED at Houston, Texas on this 12TH day of February, 2004.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

For the reasons set forth in the separate Memorandum and Order signed this day, it is

ORDERED that the United States's Motion to Dismiss is (Document No. 10) GRANTED, and all Plaintiffs' claims are DISMISSED for lack of subject matter jurisdiction.

This is a FINAL JUDGMENT.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 12TH day of February, 2004.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

---------- Footnotes ----------

n1 Pursuant to Fed. R. Civ. P. 25(d)(1), John Snow and Mark W. Everson are substituted as Defendants in this case.

n2 *See In Re Grand Jury Proceedings, 62 F.3d 1175, 1177 (9th Cir. 1995).*

n3 As Defendants have responded to the material added in Plaintiffs' Second Amended Complaint and not moved to strike, it is deemed admitted, and the United States's Motion to Dismiss is deemed to apply to it as well, together with the Government's supplemental arguments made in its Response at Document No. 36.

n4 The claims of those Plaintiffs who have paid all taxes and interest assessed and who are seeking a refund of interest are governed by *28 U.S.C. § §*

1346(a) and *26 U.S.C. § 7422*, which are dealt with below. *See Beall, 336 F.3d at 424-25, 427 n.9* (noting that suits for a refund and challenges to the IRS's refusal to abate interest can be brought under *§ § 1346 and 7422*, and that the APA is not an appropriate vehicle for such actions).

n5 Plaintiffs also invoke *28 U.S.C. § 1340*. Although *§ 1340* grants jurisdiction over civil actions arising under "any Act of Congress providing for internal revenue," it does not constitute a waiver of sovereign immunity. *See Geurkink Farms, Inc. v. United States, 452 F.2d 643 (7th Cir. 1971)*.

Department of Treasury
Internal Revenue Service
Memphis, TN 37501-0010

Date of this notice : 8/12/2002
Taxpayer Identifying Number: 436-6
4-3046
Form: 1040
Tax Period: 12/31/1986

Caller Id: 789194

Thomas D. Adams
4224 Houma Blvd Apt 224
Metairie, LA 7006-2935747

FOR ACCOUNT OF THOMAS O & DEARDRA ADAMS JR

WE CHANGED YOUR ACCOUNT:18211-227-11018-7

THE CHANGE(S) BELOW RESULTED FROM AN EXAMINATION OF YOUR TAX RETURN SHOWN ABOVE. PLEASE SEE YOUR COPY OF THE EXAMINATION REPORT FOR A DETAILED EXPLANATXON OF THE CHANGES

IF YOU HAVE ANY QUESTIONS, PLEASE CALL US AT THE NUMBER *LISTED* ABOVE,

STATEMENT OF ACCOUNT

ACCOUNT BALANCE BEFORE EXAMINATION ACTION: NONE

INCREASE IN TAX BECAUSE OF EXAMINATION ACTION: $22,085.00

INTEREST CHARGED: $91,035.47

AMOUNT YOU NOW OWE: $113,120.47

WE WANTED TO ENSURE THAT BOTH YOU AND YOUR SPOUSE RECEIVE THIS NOTICE, SO, WE'VE SENT A COPY TO EACH OF YOU, EACH COPY CONTAINS THE SAME INFORMATION RELATED TO YOUR JOINT ACCOUNT. ANY AMOUNT YOU OWE OR BALANCE DUE SHOWN SHOULD BE PAID ONLY ONCE. WE WILL ISSUE ANY REFUND SHOWN ONLY ONCE.

PLEASE PAY THE FULL AMOUNT BY AUG. 26, 2002. IF YOU'VE ALREADY PAID YOUR TAX IN FULL OR ARRANGED FOR AN INSTALLMENT AGREEMENT. PLEASE DISREGARD THIS NOTICE.

IF YOU HAVEN'T PAID, MAIL YOUR CHECK OR MONEY ORDER AND THE TEAR-OFF STUB FROM THE LAST PAGE OF THIS NOTICE, MAKE YOUR CHECK PAYABLE TO UNITED STATES TREASURY AND WRITE YOUR SOCIAL SECURITY NUMBER ON IT. IF YOU CAN'T PAY IN FULL, PLEASE CALL US TO DISCUSS PAYMENT.

INTERNAL REVENUE SERVICE

Date: September 5, 2002

Mr. T. Adams
4224 Houma Blvd Apt. 224
Metaire LA 74046-2935

Taxpayer Id: 436-64-3046
Kind of Tax: Income
Amount Of Claim(s): unspecified
Date Claim(s) Received: 02-15-00
Tax Perlod(s) Ending: various
Project Partnership: AMCOR

Dear Mr. Adams

We are unable to process your claim for the tax pedod(s) shown above for the reasons) listed below.

Your claim for abatement of Interest under I.R.C. section 6404(a) conceming the above referenced partnership is denied. You have not established that you qualify for interest abatement under the provisions of I.R.C. section 6404(e).

Your claim for refund of the additional Interest that has been assessed under I.R.C. section 6621(c) is denied. The terms of the settlement agreement entered Into by the parties included the assessment of I.R.C. section 6621(c) Interest, Furthermore, you have, not established that the transactions entered into by the above referenced partnership were not tax motivated transactions under I.R.C. section 8021(c).

Your claim for refund based on the expiration of the statute of limitations is denied. The issue of whether the partnership properly extended the statute of limitations is a partnership item. Your claim is precluded under I.R.C. section 7422(h). TEFRA requires that all challenges to adjustment of partnership items be made in a single, unified agency proceeding, at the partnership level.

This disallowance relates only to any claim or portion of a claim filed on one of the grounds stated above,.Basis and recapture claims are not included in this disallowance letter

If you have any questions, please write to us at the address shown at the top of this letter. You may also call Toni-Ann Selesky at (631) 447-4595 between the hours of 8:00am and 3:30pm EST Monday thru Wednesday. If the number is outside your local calling area, there will be a long distance charge to you.

Whenever you write, please include this letter and, in the space below give us your telephone number with the hours we can reach you. Keep a copy of this letter for your records.

Thank you for your cooperation.

Lynne Walsh, Field Director Compliance Services

MOTION FILED
SEP 9 - 2005

(2)

No. 04-1719

In the
Supreme Court of the United States

GEORGE DALTON BROOKS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE OUT OF TIME AND BRIEF OF MULTIPLE AMCOR AND ELEKTRA PARTNERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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In the
Supreme Court of the United States

GEORGE DALTON BROOKS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* OUT OF TIME

The petition for writ of certiorari in this case was filed on June 20, 2005. Any objection by respondent, the United States, was due July 22, 2005. On June 29, 2005 the United States waived its right to file a response. Pursuant to Rule 37.2(a) *amicus* briefs were due on or before July 22, 2005.

The petition for writ of *certiorari* was filed on behalf of a group of partners in a series of related partnerships generally referred to as the "AMCOR partnerships." The undersigned counsel represents hundreds of other AMCOR partners, including the *amici curiae*. Before the attached *amicus* brief could be filed it was necessary to determine that there existed no conflict between the *amici curiae*'s interest in filing the *amicus* brief and their ongoing interest in their other tax related AMCOR matters. As a result of the time required to conduct that review the attached *amicus* brief could not be filed on or before July 22, 2005.

Therefore, pursuant to Rule 37.2(b), the *amici curiae*

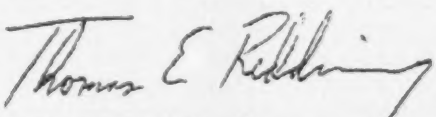
request that this motion be granted and they be allowed to file their attached *amicus* brief in support of the petition for writ of certiorari.

Petitioners' council, Mr. Henry L. Klein, consents to the granting of this motion and his letter of consent is being filed with the Clerk's office along with this motion and the attached *amicus* brief.

Counsel for the United States was contacted and represented that the respondent takes no position on the granting of this motion.

WHEREFORE, *amici curiae* respectfully request that they be allowed to file out of time the attached *amicus* brief in support of the petition for writ of *certiorari*.

Respectfully submitted.



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SEPTEMBER 2005

ISSUE ADDRESSED

This *amicus* brief is limited solely to the issue of whether the Fifth Circuit's opinion below violates the fundamental due process rights of all taxpayers who are partners in partnerships subject to TEFRA by an improper taking or conversion of their right to abatement of interest authorized by Congress in the Reform Act.

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INTEREST OF THE *AMICI CURIAE*[1]

Like the petitioners, Charles Atkinson, James Houston, Jack McCrary, and Horace Whittington, four of the *amici curiae*, are partners in nine of the 43 AMCOR partnerships. The undersigned counsel represents hundreds of additional AMCOR partners similarly situated to those *amici curiae*. John Phillips, the remaining *amicus curiae*, is a partner in one of the seven ELEKTRA partnerships, a group of partnerships unrelated to AMCOR, but whose partners are similarly affected by the IRS's refusal to follow Congressional direction with regard to offer-in-compromise relief. The undersigned counsel represents roughly 40 of the ELEKTRA partners similarly situated to Mr. Phillips and is aware of hundreds of other ELEKTRA partners who may also be affected. The partnerships in both the AMCOR and the ELEKTRA partnership groups are subject to TEFRA[2] for the years at issue.

As discussed in the petition for writ of *certiorari*, 43 of the AMCOR partnerships were subject to extended partnership-level litigation involving tax years 1984, 1985 and 1986 in the United States Tax Court. Those cases began in 1990 and 1991, and concluded in 2001 and 2003. After the cases concluded, the IRS assessed the resulting tax liabilities against the applicable partners, estimated at 1500 individual taxpayer/partners. The IRS assessed both normal interest and the inflated "penalty" rate of interest under the former 26 U.S.C. §6621(c). Under the IRS's

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[1] Pursuant to Rule 37.6, the *amici curiae* state that no counsel for a party has written this brief either in whole or in part. No one other than the *amici curiae* and their counsel have made a monetary contribution to the preparation and submission of this brief.

[2] Partnership procedures codified at 26 U.S.C. §§6221-6233, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 ("TEFRA"), and as thereafter amended.

computations, the interest began to accrue as early as April 15, 1985, and was compounded daily.

Atkinson, Houston, McCrary, and Whittington were partners in nine of the 43 AMCOR partnerships against whom the IRS assessed tax and interest liabilities based on the Tax Court's AMCOR decisions.[3]

Phillips was a partner in Drake Oil Technology Partners, one of the 7 ELEKTRA partnerships. Like the AMCOR partnerships, the ELEKTRA partnerships were subject to extended Tax Court litigation. There the tax years involved were 1983, 1984 and 1985. The cases were filed in 1987 and 1988, and the decisions were entered in 2002.[4] Like the AMCOR taxpayer/partners, Phillips and the other roughly 400 similarly situated ELEKTRA taxpayer/partners were then assessed the resulting tax

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[3] Atkinson: *Agri-Cal Venture Assoc. v. C.I.R.*, docket no. 12530-90, *Agri-Venture Fund v. C.I.R.*, docket no. 15034-91, *Agri-Venture-1985 v. C.I.R.*, docket no. 15035-91, *Oasis Date Assoc. v. C.I.R.*, docket no. 15037-91, *Pump Station III Assoc. v. C.I.R.*, docket no. 15040-91, *Western Ag- Venture Assoc. v. C.I.R.*, docket no. 12540-90.

Houston: *Houston Farm Assoc. II v. C.I.R.*, docket no. 15041-91, *Western Ag- Venture Assoc. v. C.I.R.*, docket no. 12540-90.

McCrary: *Crop Associates-1986 v. C.I.R.*, docket no. 12532-90, *Houston Farm Assoc. II v. C.I.R.*, docket no. 15041-91

Whittington: *El Rancho Vineyards v. C.I.R.*, docket no. 15049-91, *Pump Station III Assoc. v. C.I.R.*, docket no. 15040-91.

[4] See the decisions entered June 13, 2002, in *Vulcan Oil, et al. v. Commissioner*, at docket nos. 21530-87 (tax year 1983) and 16768-88 (tax years 1984 and 1985). Those were consolidated cases for seven related ELEKTRA partnerships: Vulcan Oil Technology Partners, Vanguard Oil Technology Partners, Drake Oil Technology Partners, Dillon Oil Technology Partners, Derringer Oil Technology Partners-1981, Derringer Oil Technology Partners-1982, and Crowne Oil Technology Partners.

liabilities, normal interest, and the inflated "penalty" rate of interest under the former 26 U.S.C. §6621(c). Under the IRS's computations, the interest began to accrue as early as April 15, 1984, and was compounded daily.

For most AMCOR and ELEKTRA partners the total interest assessments were between 500% and 800% of the tax assessments. On average between 25% and 30% of the total interest assessment was due solely to the imposition of the 26 U.S.C. §6621(c) penalty rate.

Based on 25 years tax litigation experience involving hundreds of partnership cases and thousands of taxpayers, counsel for the *amici curiae* has personal knowledge that similar circumstances apply to thousands of taxpayers caught up as passive investors in partnerships that have become embroiled in partnership-level tax cases taking sometimes well over a decade to reach conclusion and over which they exercise no control. The result is often crippling accruals of interest being assessed sometimes 20 years after the investments and often when the taxpayer is elderly and retired due to the protracted nature of the partnership-level proceedings.

Amici Atkinson filed an offer-in-compromise pursuant to 26 U.S.C. §7122 for tax year 1985 related to tax ($25,322) and interest ($119,592.92) assessed by the IRS in 2002 arising from the AMCOR partnership-level Tax Court cases. His offer-in-compromise requested, in part, that part of the excessive interest be abated pursuant to Congressional intent in enacting the effective tax administration option. But his offer-in-compromise was withdrawn when it became clear that it would not be given an honest evaluation under the parameters established by Congress in the Reform Act[5] for such interest accruals in

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5 Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 ("the Reform Act").

an effective tax administration offer-in-compromise.

Amici Houston filed an offer-in-compromise for tax years 1985 and 1986 related to tax ($13,592 and $12,614, respectively) and interest ($53,690.43 and $51,893.64, respectively) assessed by the IRS in 2002 arising from the AMCOR partnership-level Tax Court cases. His offer-in-compromise requested, in part, that the long standing interest accruals be abated pursuant to Congressional intent in enacting the effective tax administration option. His offer-in-compromise was denied. The Internal Revenue Code does not provide for judicial review of denied offers-in-compromise. His offer-in-compromise was revised and resubmitted to the IRS as part of a collection due process ("CDP") hearing.[6] If the revised offer-in-compromise is also denied then, as part of the CDP determination, that denial would ordinarily be appealable to either the United States Tax Court or a federal district court. [7] But it is the IRS's position that no appeal is available from a CDP denial where, as here, the liability addressed in the offer-in-compromise arises from a TEFRA partnership-level case.[8]

Amici McCrary filed an offer-in-compromise for tax years 1985 and 1986 related to tax ($33,096 and $60,910, respectively) and interest ($153,382.81 and $171,998.19, respectively) assessed by the IRS in 2002 arising from the AMCOR partnership-level Tax Court cases. His offer-in-compromise requested, in part, that the long standing interest accruals be abated pursuant to Congressional intent in enacting the effective tax administration option. His offer-in-compromise was denied. There is no avenue to

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6 26 U.S.C. §6330.

7 26 U.S.C. §6330(d)(1); *Lites v. Commissioner*, T.C. Memo 2005-206.

8 The CDP procedures are not in issue here.